(23)

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO.1075 OF 2004

APPELLANT (In Jail) — PARDESHI RAM

Vs

RESPONDENT — STATE OF CHHATTISGARH.

POST FOR JUDGMENT ON 1st June, 2007

Sd/-
Dhirendra Mishra
Judge

(24)

HIGH COURT OF CHHATTISGARH AT BILASPUR
CRIMINAL APPEAL NO.1075 OF 2004

APPELLANT (In Jail)	Pardeshi Ram, S/o Barat Ram Sahis, aged about 38 years, Vilage Beladula, P.S. Jejepur, District Janjir (Champa), At present R/o Imliduggu, District Korba C.G.
Vs	
RESPONDENT	State of Chhattisgarh through P.S. Kotwali, Dist. Korba (C.G.)

Present:

Mr. C.R. Sahu, Advocate for appellant.

Mr. Vinay Harit, Dy. Advocate General for the State.

J U D G M E N T

(Delivered on 01.6.2007)

Dhirendra Mishra, J:

1. The instant appeal is directed against the judgment dated 30th November, 2004 passed in Sessions Trial No.95/04 by learned Additional Sessions Judge, Korba whereby learned Additional Sessions Judge has convicted the appellant under Sections 363 & 376 (2) (f) of the I.P.C. and sentenced to undergo R.I. for 5 years and fine of Rs.500/- & R.I. for 10 years and fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 3 months & 6 months respectively. Both the sentences have been directed to run concurrently. However, the conviction under the default clause is to be undergone one after another.

2. Case of the prosecution, in brief, is that in the intervening night of 18th & 19th May, 2004 Dhansai, his wife Guddi Bai and other children were sleeping in the courtyard, as it was summer. At about 2-2.30 hrs in the night when he woke up, he found that his daughter was not present in the cot where she was sleeping and white bed sheet by which she had covered herself was lying beside

the cot. After searching for her in the vicinity, he lodged the missing report in the Police Station Kotwali at about 03.20 hrs giving description of the prosecutrix, which was registered as missing report No.34/04. During investigation of missing report, on 19.5.2004 at 1700 hrs the prosecutrix was recovered from the custody of the appellant from the house of Jethuram vide recovery memo of Ex.P-1. Thereafter, offence under Sections 363 & 376 of the IPC was registered on 19.5.2004 vide report Ex.P-11.

3. During investigation, spot map was prepared vide Ex.P-5, the prosecutrix was sent for medical examination to Primary Health Centre, Korba after seeking permission from the District Magistrate, where Dr. (Smt.) R. Paliwali (PW-4) examined the prosecutrix and gave her report of Ex.P-6. Underwear of the accused was taken into possession vide Ex.P-3. The accused was sent for medical examination to Primary Health Centre, Korba, where Dr. S.K. Agarwal (PW-6) examined him and gave his report of Ex.P-8. Slides of vaginal secretion were taken into possession vide Ex.P-10.

4. After completing investigation, charge sheet was filed against the accused/appellant in the Court of Chief Judicial Magistrate, Korba, who in turn committed the case to the Court of Sessions Judge, Bilaspur and the same was received by the Additional Sessions Judge on transfer for trial. The prosecution in order to establish the charges against the accused examined 11 witnesses in all. Statement of accused was recorded under Section 313 of the Cr.P.C., and in reply to Question No.1 the appellant has stated that he found the girl in abandoned condition in the night to whom he had taken to her house. In reply to Question No.5 he has stated that in the night she found the girl on road, she was not able to tell her address and therefore, he returned her at 6.00 a.m. He has also stated that he had handed over the girl to her mother even

before arrival of the police. In answer to rest of the questions either he had expressed ignorance or he had denied the circumstances appearing against him in the prosecution case. Learned trial Court after hearing learned counsel for the respective parties, convicted & sentenced the appellant as mentioned above.

5. Learned counsel for the appellant submits that there is no evidence available on record to show that the appellant abducted the prosecutrix and thereafter raped her. The defence of the appellant that in the night he spotted the child on the road in the abandoned condition and therefore, he took her with him and spent the night in his maternal uncle's home and thereafter returned the child to her parents early in the morning at 6.00 a.m. even before arrival of the police, is established from the evidence available on record. However, the trial court ignoring the defence of the appellant has convicted him by the impugned judgment.

6. On the other hand, learned Dy. Advocate General for the State has supported the judgment of trial court.

7. I have heard learned counsel for the parties.

8. It is not in dispute that none of the witnesses had seen the appellant taking the prosecutrix while she was sleeping in her home with her mother and the parents of the child have not stated that as to under what circumstances the child left the home while she was sleeping with them. As per case of the prosecution, the child is shown to have been recovered from the custody of the appellant from the house of Jethuram vide recovery memo of Ex.P-1 at 17.00 hrs prepared by the Investigating Officer (PW-10) in presence of Jethuram (PW-5) & Dhansai (PW-2).

9. PW-1 Guddi Bai, mother of prosecutrix in Para 2 of her deposition has stated that the accused present in the Court had brought the

child back at about 6.00 a.m. on the date of incident when they had lodged the missing report in the Police Station Kotwali, Korba. She has further stated that at 12.00 noon when she was bathing the prosecutrix at that time she complained pain in her private part whereupon she related the above fact to her mother-in-law Samundra Bai. She has further stated that the prosecutrix did not tell anything about the accused.

10. PW-2 Dhansai, father of the prosecutrix, has also stated that the prosecutrix was missing in the night, whereupon he had lodged the missing report, police came and were searching her. When the police personnel were present in his house at that time the accused brought the child back to their home. In Para-9 also he has stated that it is true to say that the accused had brought the child back home in the morning and handed over to them. Jethuram (PW-5) has also stated in Para 7 of his deposition that the accused had left his house at 6.00 a.m. along with the child.

11. The above version of the prosecution witnesses has not been challenged by the prosecution, therefore, the case of the prosecution that the child was recovered at 17.00 hrs from the house of Jethuram (PW-5) from the custody of the appellant stands falsified.

12. Learned trial court on the basis of the statement of Jethuram (PW-6) and further on the ground that the accused brought back the prosecutrix and returned her to her parents in the morning has held that the appellant had in fact abducted the prosecutrix from the lawful custody of her parents and had taken her to the house of Jethuram (PW-6) and the defence of the accused has been disbelieved on the ground that he did not report the matter to the police immediately after finding the girl and went to the house of Jethuram with whom his relations were strained and whose house he had not visited for last three years.

(26)

13. Jethuram (PW-5) has stated that he recognizes the accused and the prosecutrix. He had signed the recovery memo of Ex.P-1 in the police station. On the date of incident he had gone out in connection with distribution of marriage card and after returning he slept in his home. In the morning he saw the accused sleeping in his courtyard with one child after opening the gate, when he asked about that girl, he informed that she is his daughter. Accused resides elsewhere but in the night of incident he was sleeping in his house with a four year old girl. Though, this witness has been declared hostile, but he has been cross examined at length by the prosecution and in the cross-examination he has denied the suggestion that on interrogation by the police the girl as also the accused had admitted before him that accused had sexual intercourse with the prosecutrix. He has further stated that it is incorrect to say that the accused was residing in his house. In Para-6 he has stated that earlier for a period of 1½ month accused had resided in his house, however due to some quarrel between them he had ousted him and thereafter for the first time he returned in the night of incident with the girl. He has further stated that the accused came to his house and shouted, however, none of them got up, on which the accused opened the gate and slept. By the time accused came in the night, he has already slept for a while. In the morning at about 5-6 a.m. he saw that the accused was sleeping with the prosecutrix on the cot. On that day, his brother & his wife were also present in his house. When he saw the child, he enquired about her from the accused and he replied that she is his daughter, on which he had abused him and asked him to return the girl, whereupon, he left the home with the child at about 6.00 a.m. In the cross-examination by the defence, he has replied that he does not remember that the accused had told her that the girl had forgotten the way of her house and therefore, he brought her with him. He has further stated that on being asked

(29)

the child was not able to tell the name of her parents. He has also stated that when the child was leaving with his nephew, she was not weeping.

14. After close scrutiny of the evidence of Jethuram (PW-6), this Court is of the considered opinion that solely on the basis of the statement of this witness, who has been declared hostile by the prosecution itself and statement of this witness is not corroborated by any other evidence, the court below was not justified to reject the defence of the accused and to reach to the conclusion that the accused abducted the prosecutrix from the lawful custody of her parents and kept her in the house of Jethuram. From the evidence of Jethuram it is evident that other persons were also present in his house on the date of incident, however, none of the residents of the house has been examined by the prosecution. Further, learned trial court referring the statement of PW-2 Dhansai in Para 11 of the judgment that height of the canal is 50 feet and it was not possible for the prosecutrix to reach on the canal way has disbelieved the defence of the accused ignoring the admission of Dhansai (PW-2) in Para 10 of his deposition that all his family members small as well as aged used the canal way. He has again stated that it is true to say that they got her daughter examined at the behest of the police though she was not given any treatment in the hospital. He has further admitted that had the accused taken the girl from their home, he would not have came back to leave her back.

15. Therefore, in the absence of any cogent, reliable & trustworthy evidence regarding abduction of the prosecutrix and in the light of the conduct of the accused, who returned the child admittedly at about 6.00 a.m. to her parents, defence of the appellant appears to be probable and the story of the prosecution that child was

(30)

recovered at 17.00 hrs from the house of Jethuram when she was in the custody of the appellant is false and fabricated.

16. Now coming to the allegation of rape by the appellant of the prosecutrix. From the statement of Guddi Bai (PW-2), mother of prosecutrix, it is evident that the prosecutrix complained pain on her private part at about 12.00 noon while she was bathing her, though the prosecutrix was returned by the appellant at about 6.00 a.m. She has stated in her examination-in-chief that even after complaining pain in her private part the prosecutrix did not tell anything about the accused in this regard.

17. Dhansai (PW-2), father of prosecutrix, in Para 3 of his statement has stated that the prosecutrix had told her that the accused raped her and the accused in fact taken the prosecutrix from her cot. However, in Para 8 of his deposition this witness has stated that his daughter was not recovered from the house of Jethuram and his daughter had not stated to him or his wife about the rape.

18. Learned trial court relying upon the statement of Dr. (Smt.) R. Paliwal (PW-4) and medico legal report of the prosecutrix Ex.P-6, in which she found reddishness & swelling in the vagina of prosecutrix and she was complaining pain and further on the ground that the accused & prosecutrix were sleeping together in the house of Jethuram (PW-5), has reached to the categorical finding that the accused committed rape with the prosecutrix.

19. Doctor (PW-4) has stated that on examination she did not find any injury on any part of the body of prosecutrix though she noticed swelling and reddishness on the right side of her vagina and she was complaining pain. Hymen of the prosecutrix was intact and on the basis of examination she has stated that she is not in a position to give definite opinion of rape, however, it is possible that attempt to commit rape might have been made. In the cross-

(31)

examination she has admitted that the reddishness described by her may be caused by itching or the same was possible by some scratch also. Except swelling, reddishness and complain of pain by the prosecutrix, there is no evidence available on record to suggest that the appellant made any attempt to have sexual intercourse with the prosecutrix. The child admittedly did not complain anything either to her parents or to any other person including Jethuram (PW-5).

20. From the statement of above witnesses, I am of the considered that the prosecutrix during her stay with the accused was comfortable as none of the witnesses has stated that she was weeping, frightened or in any manner complaining against the accused while she was brought back to her home. Therefore, the finding of the trial court on the basis of the medical opinion and other evidence that the appellant subjected her to rape is based on surmises, which cannot be sustained.

21. In the result, the appeal of the appellant succeeds. Conviction of the appellant under Sections 363 & 376 (2) (f) of the IPC and sentences imposed under those sections are hereby set aside and he is acquitted of the above charges. The appellant be set at liberty forthwith, if not required in any other case.

Sd/-
Dhirendra Mishra
Judge

Roshan/-